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In The

Supreme Court of the United States

MAHENDRA PRATAP GUPTA,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. Whether federal appeals courts should consider the "substantive reasonableness" of a district court's sentence even where that sentence is "procedurally unreasonable" due to the district court's miscalculation of the Sentencing Guidelines, in order to promote judicial economy by rendering the procedural errors harmless, thereby obviating a new sentencing hearing on remand.

II. Whether application of the Mandatory Victims Restitution Act of 1996 ("MVRA"), 18 U.S.C. § 3663A(a)(1), to conduct that occurred before the effective date of MVRA violates the Constitutional prohibition against *Ex Post Facto* Law.

LIST OF PARTIES TO THE PROCEEDING

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Treasure Coast Health Care Services, Inc.

West Coast Healthcare Services, Inc.

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OPINION BELOW

On June 23, 2009, the Court of Appeals for the Eleventh Circuit entered its opinion reversing the Petitioner's sentence and remanding the case for re-sentencing before a different district court judge. *United States v. Gupta*, 572 F.3d 878 (11th Cir. 2009).[1] On August 31, 2009, the Eleventh Circuit entered an order denying Mr. Gupta's Petition for Rehearing and for Rehearing *En Banc*. *United States v. Gupta, et al.*, Case No. 08-12248 (11th Cir., August 31, 2009) (unpublished). A copy of the panel's published opinion accompanies this Petition as Appendix App. 1. A copy of the district court's Judgment and Commitment order accompanies this Petition as Appendix App. 33. A copy of the unpublished order denying the Petition for Rehearing and Rehearing *En Banc* accompanies this Petition as Appendix App. 40.

JURISDICTION

Judgment was originally entered by the circuit court of appeals on June 23, 2009, and the petition for rehearing was denied on August 31, 2009. Thus this Petition is being timely submitted within the period

[1] That opinion (*Gupta III*) was the third by the Eleventh Circuit in this case. The Eleventh Circuit had previously issued opinions in this case in *United States v. Gupta*, 363 F.3d 1169 (11th Cir. 2004) (*Gupta I*), and in *United States v. Gupta*, 463 F.3d 1182 (11th Cir. 2006) (*Gupta II*).

permitted by Rule 13 of the Supreme Court's Rules. The district court that sentenced Petitioner had jurisdiction over this criminal case pursuant to 18 U.S.C. § 3231. The Eleventh Circuit had jurisdiction over the Petitioner's direct appeal pursuant to 28 U.S.C. § 1291 and 18 U.S.C. § 3742. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. Article 1, sec. 9, clause 3 of the United States Constitution provides: "No bill of attainder or ex post facto Law shall be passed."

2. The following statutory provisions are set forth in relevant part in the Appendix:

   a. 18 U.S.C. § 3663

   b. 18 U.S.C. § 3663A

STATEMENT OF THE CASE

The Petitioner, Mahendra Pratap Gupta, was one of fifteen defendants indicted by a federal grand jury on Medicare fraud charges in the District of Montana in September 1997.[2] The case was transferred to the

[2] The facts giving rise to this case are discussed at length in *Gupta II*, 463 F.3d at 1188-90.

Southern District of Florida. (D.E. 1).[3] The district court granted a pretrial severance for four defendants, against whom all charges were later dismissed. In addition, thirteen counts of the Indictment against the remaining defendants were also dismissed. (D.E. 217). The case proceeded to trial on three counts – one count of conspiracy to submit a false claim and two counts of mail fraud – against Petitioner Gupta and the remaining codefendants. (D.E. 2 at 4).[4] On November 5, 1999, the Petitioner and the defendant home health agencies were convicted by the jury. (D.E. 338-344).[5] Due to the complexity of various sentencing issues, the district court deferred the sentencing hearing for over a year, until January 26, 2001.

At that hearing, the district court declined to sentence the convicted defendants due to "the complexity of the issues presented" and over "concerns that Defendant Gupta may well be innocent of the charges." (D.E. 312 at 3). The district court instead requested supplemental submissions addressing a request that it reconsider its earlier denial of the

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[3] "D.E." refers to the Docket Entry per the Criminal Docket Sheet prepared by the district court clerk's office. Citations to the Record are provided pursuant to Supreme Court Rule 12.7.

[4] The pre-verdict motion for judgment of acquittal by one codefendant, Kuldeep K. Hajela, was granted on November 12, 1999. (D.E. 242).

[5] Another codefendant, Edward Quinlan, was acquitted of all charges by the jury. (D.E. 243).

defendants' motions for judgment of acquittal. (D.E. 312 at 4). On October 16, 2002, the district court vacated the jury verdicts and granted judgments of acquittal to all defendants. (D.E. 312).

The government appealed this order on procedural grounds. The Eleventh Circuit found the order granting the judgments of acquittal procedurally untimely, reversed the acquittals, and remanded the case to the district court for sentencing. *United States v. Gupta*, 363 F.3d 1169, 1174 (11th Cir. 2004) ("*Gupta I*").

At a sentencing hearing on November 5, 2004, the district court determined that the offense had resulted in no "loss" to Medicare under U.S.S.G. § 2F1.1(b)(1), and declined to enhance the Petitioner's offense level on the basis that he was an "organizer/leader" under U.S.S.G. § 3B1.1(a). The district court sentenced the Petitioner to a three-year term of probation and a fine of $10,000.00. (D.E. 344).

The defendants, including the Petitioner, appealed their convictions, and the government cross-appealed on sentencing issues. In *United States v. Gupta*, 463 F.3d 1182 (11th Cir. 2006) ("*Gupta II*"), the Eleventh Circuit affirmed the convictions, but remanded for re-sentencing, holding that the district court erred in finding that the Petitioner's criminal activity had not been "otherwise extensive" and in finding that his offenses had resulted in no "loss" to the Medicare program. *Id.* at 1199-1200. The opinion in *Gupta II* discussed the reports of the three "experts" relied

upon by the government at sentencing, but failed to make any mention of the report by defense expert Stanley Foodman, a forensic accountant whose analysis had undercut the conclusions of the primary government witness, Gary Young, and thereby furnished the basis for the district court's determination that there had been "no loss." (Gupta R.E., D.E. 405, Exhibit D).[6]

On March 28, 2008, the Petitioner and two of the corporate defendants appeared before the district court for re-sentencing.[7] By this time, all the corporate defendants were out of business, had ceased providing Medicare services, and had surrendered their applicable licenses. (D.E. 405, Exhibit A).[8] By the time of this re-sentencing, the district court also had the benefit of this Court's seminal decisions in *Rita v. United States*, 127 S.Ct. 2456 (2007), *Gall v. United States*, 128 S.Ct. 586 (2007), and *Kimbrough v. United States*, 128 S.Ct. 558 (2007), opinions issued after *Gupta II* had been decided in September 2006.

Upon considering both parties' written submissions and expert accounting reports, as well as the testimony of the government's expert and of the

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[6] "Gupta R.E." refers to the Petitioner Gupta's Record Excerpts filed in the court below.

[7] In *Gupta II*, the Eleventh Circuit affirmed the sentences imposed on three of the other corporate codefendants – Atlantic Health Care Services; West Coast Healthcare Services; and Treasure Coast Health Care Services, Inc. *See* 463 F.3d at 1200.

[8] Gupta R.E., D.E. 405.

Petitioner's Psychiatrist, and after entertaining the argument of counsel, the district court arrived at a "loss" calculation of $1.5 million dollars, resulting in an 11-level enhancement to the Petitioner offense level under U.S.S.G. § 2F1.1(b)(1). The court also imposed enhancements of two levels for "more than minimal planning," under U.S.S.G. § 2F1.1(b),[9] and four levels for "organizer/leader," pursuant to U.S.S.G. § 3B1.1(a).[10] It also granted a two-level reduction for "acceptance of responsibility" pursuant to U.S.S.G. § 3E1.1(a), resulting in a total offense level of 21 for the Petitioner.

Finding that the loss as calculated overstated the seriousness of the offense (E.R. 154),[11] and after applying the circumstances of the case to the factors set out in 18 U.S.C. § 3553(a), the district court initially granted the Petitioner a downward variance to a Level 12 which, with his Criminal History Category I, placed Petitioner in Zone C of the Sentencing Table, with a guideline range of 10-16 months. (E.R. 155). Based on this determination, the district court indicated an intent to sentence the Petitioner to five-months' imprisonment, followed by three years' supervised release.

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[9] This enhancement had been applied in the previous sentencing.

[10] This enhancement was consistent with the decision in *Gupta II, supra*.

[11] References to "E.R." are to the Modified Record Excerpts submitted by the government in the court below.

Before imposing sentence, however, the district court heard the testimony of the Petitioner's psychiatrist establishing that imprisonment would have a severely deleterious effect on the Petitioner's fragile mental health and the continuity of his treatment for his psychiatric condition and for his alcoholism. After hearing this testimony, the district judge reduced the Petitioner's offense level from 12 (10-16 months) to 10 (6-12 months) – placing him in Zone B of the sentencing grid, which permits home detention *in lieu* of imprisonment – and sentenced the Petitioner to probation with a special condition of 12-months' home confinement with electronic monitoring (at his expense) and a fine of $25,000 (an increase of $15,000 from the original fine imposed as part of his 2004 sentence). (E.R. 164, 243). Shortly after the sentencing, the Petitioner began serving his one year of electronically-monitored home detention, and paid his fine in full.

The Government again took an appeal from the district court's sentencing decision. *United States v. Gupta*, 572 F.3d 878 (11th Cir. 2009) (*Gupta III*). On appeal the government argued that the district court erred in two respects in calculating the Petitioner's Sentencing Guidelines score – first in determining the amount of the "fraud loss," under U.S.S.G. § 2F1.1; second, in granting the Petitioner a two-level downward adjustment for "acceptance of responsibility" under U.S.S.G. § 3E1.1(a).

The government also argued that the district court erred in failing to order the Petitioner to pay

restitution. In addition, asserting that the sentence as a whole was unreasonable, the government sought remand of the case for re-sentencing before a different district court judge. In *Gupta III*, the Petitioner argued that the district court correctly calculated the guidelines, as to both the "loss" amount and his "acceptance of responsibility," and in declining to order restitution. The Petitioner further argued that, even if the guideline calculation was incorrect and, thus, "procedurally unreasonable," the district court's sentence should be affirmed as "substantively reasonable" since the court properly considered the appropriate sentencing factors under 18 U.S.C. § 3553(a). During oral argument in this case, issues arose regarding the district court's decision not to order restitution, primarily whether the district judge was required to order restitution pursuant to the Mandatory Victims Restitution Act of 1996, 18 U.S.C. § 3663A ("MVRA"), or whether an order of restitution was discretionary under 18 U.S.C. § 3663, the "Victims and Witness Protection Act of 1982" ("VWPA").[12]

In its opinion in *Gupta III*, the Eleventh Circuit agreed with the government that the district court's sentence was "procedurally unreasonable" in that it failed to calculate the Petitioner's guidelines

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[12] The second issue that arose at oral argument regarding restitution was whether the district court had discretion to allow the restitution amount to be determined in the appeals pending before the Medicare Provider Reimbursement Review Board.

correctly, both as to the amount of "fraud loss" and as to his "acceptance of responsibility." *Gupta III*, 572 F.3d at 888-90. The Eleventh Circuit also held that the district court abused its discretion in declining to order restitution since Petitioner's conduct was covered by the mandatory restitution act. *Id.* at 890-91. Having found these procedural errors in the calculation of Petitioner's guidelines score, the Eleventh Circuit disposed of the Petitioner's argument regarding "the substantive reasonableness" of the district court's sentence in a single sentence, insisting that a remand was required because the Sentencing Guidelines had to be calculated correctly before the "substantive reasonableness" could even be considered. *Id.* at 888.[13]

The Eleventh Circuit denied the Petitioner's Petition for Rehearing or for Rehearing *En Banc*, and this Petition for Writ of Certiorari timely followed.

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[13] Over the dissent of one of the members of the *Gupta III* panel, the Eleventh Circuit also granted the government's request that the case be remanded for re-sentencing by a different district court judge. *Id.* at 891-92; *see also id.* at 892-93 (Barkett, J., dissenting in part).

ARGUMENT

I. Certiorari ought to be granted in this case to clarify that federal appeals courts should consider the "substantive reasonableness" of a sentence even where the district court has miscalculated the Sentencing Guidelines since such a procedure would promote judicial economy by rendering the alleged procedural errors harmless, thereby obviating a new sentencing hearing on remand.

This Court's precedents provide that appellate courts should conduct a two-prong review a district court's sentencing decision, for both "procedural" and "substantive reasonableness." *Gall v. United States*, 128 S.Ct. 586 (2007); *Rita v. United States*, 127 S.Ct. 2456 (2007); *see Nelson v. United States*, 129 S.Ct. 890 (2009). Under these cases, "procedural error" under the first prong of this test includes:

> failing to calculate (or improperly calculating) the [Sentencing] Guidelines range, treating the Guidelines as mandatory, failing to consider the § 3553(a) factors, selecting a sentence based on clearly erroneous facts, or failing to adequately explain the chosen sentence – including an explanation for any deviation from the Guidelines range.

Gall v. United States, 128 S.Ct. at 597.

Some appellate courts, including the court below in this case, have interpreted this standard to require the automatic reversal of any sentence based on an

improper Sentencing Guidelines' calculation. These appellate courts automatically vacate such a sentence and remand for a recalculation of the Sentencing Guidelines, even where the district court's calculation of the Guidelines may have played little or no role in the sentence it imposed and where that sentence is clearly "substantively reasonable" under the second prong of the test established by the *Gall* line of cases. *See, e.g., United States v. Delgado-Martinez,* 564 F.3d 750, 752 (5th Cir. 2009) (two-point miscalculation in Guidelines score required remand for re-sentencing even though sentence imposed fell within both the miscalculated range and the properly calculated range.); *United States v. Klein,* 543 F.3d 206, 213 (5th Cir. 2008) (miscalculation of "loss" under the Guidelines "constitutes an abuse of discretion" requiring remand for re-sentencing.); *United States v. Shor,* 549 F.3d 1075, 1077, n.1 (6th Cir. 2008) ("miscalculating the Guidelines range is a significant procedural error that requires reversal.") (internal quotations omitted). Such an automatic-reversal rule results in a waste of scarce judicial resources. In addition, such a rule defies legal logic, both because imposition of a sentence comporting with the Guidelines is entirely discretionary with a sentencing court ever since *Booker v. United States*, 125 S.Ct. 738 (2005), and because a Guidelines' calculation cannot even be ***presumed reasonable*** under this Court's precedent. *Nelson v. United States*, 129 S.Ct. at 892. Moreover, a slavish regard for the precise accuracy of the Guidelines' calculation makes little sense given the extremely broad discretion a

district court has to fix the terms of a federal sentence under the second, "substantive reasonableness" prong of the *Gall* test. *Gall v. United States*, 128 S.Ct. at 598-99.

The pitfalls of this approach were highlighted in trenchant testimony given recently by the Honorable Frank Easterbrook, Chief Judge of the Seventh Circuit, at a public hearing before the United States Sentencing Commission.[14] As Chief Judge Easterbrook pointed out "there's little point to th[e] fastidiousness" district court's must currently exercise in making complicated, burdensome Sentencing Guidelines' calculations when such "precise findings . . . don't affect the outcome" of the sentence actually imposed in many cases. (Transcript of U.S. Sentencing Commission Public Hearing held on September 9, 2009, at p. 194). As Chief Judge Easterbrook additionally pointed out, the result in some circuit courts is that "many a case these days is being reversed with the observation that the district court didn't calculate the guidelines correctly" even though "[t]he sentence may well be perfectly fine" resulting in the district court needlessly having to "go try again" to get the otiose Guidelines calculation correct. *Id.* at p. 193. As a consequence, "both the district courts and the court of appeals may be required to carry out an exercise

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[14] The relevant excerpt from the transcript of the Sentencing Commission's September 9, 2009, hearing containing Chief Judge Easterbrook's testimony accompanies this Petition as Appendix App. 47.

that has limited, if any effect on the sentence." *Id.* The end product is a waste of judicial resources while "more pressing tasks and other litigants" wind up "in a very long queue." *Id.* To avoid this squandering of resources, some federal appellate courts, including Chief Judge Easterbrook's own Seventh Circuit, have begun to urge federal district judges within their jurisdictions to engage in "self-help" by stating for the record that the resolution of "one or another disputed" Guidelines' issue "just doesn't matter to the final sentence[.]" *Id.* at p. 194. *See United States v. Viezcas-Soto,* 562 F.3d 903, 908 (8th Cir. 2009) (miscalculation of Guidelines required reversal where "the district court did not identify an alternative Guidelines range without the disputed enhancement and explain a variance therefrom based on the factors delineated in 18 USC 3553(a).").

Chief Judge Easterbrook made his comments in the context of recommendations to the Sentencing Commission for revisions to the Sentencing Guidelines. But as he observed, the policy he was promoting would apply with equal force to ***this Court's interpretation of how the Guidelines should be employed***.[15] As Chief Judge Easterbrook noted, this

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[15] Indeed, some appellate courts have specifically recognized the need for this Court to provide additional doctrinal clarification regarding the circumstances in which procedural error based on a miscalculation of the Guidelines can be deemed "harmless" such that remand can be avoided. *See United States v. Abbas*, 560 F.3d 660, 666 (7th Cir. 2009) (observing that "what *Gall* does not tell us is whether such an error can be harmless. If

(Continued on following page)

waste of judicial resources could be avoided if this Court were to hold that the Sentencing Guidelines were merely "recommendations to the district judges" or if the Court "just eliminated the guidelines from the list of things the district judges are obliged to do at sentencing" – as some of the Justices of this Court wanted to do in the *Booker* cases itself. *Id.* at p. 192. The Petitioner in this case submits that such a conservation of judicial resources can be accomplished less drastically by this Court, by granting certiorari in this case to clarify that sentences need not be vacated and remanded for further proceedings based on mere errors in a district court's calculation of the guidelines, where the sentence the district court imposed meets the "substantive reasonableness" prong of the *Gall* test.

Indeed, this case presents a quintessential example of the waste of resources bred by the Eleventh Circuit's refusal to consider the "substantive reasonableness" of a sentence once it finds that the district court has miscalculated the Sentencing Guidelines. In

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such an error is harmless, then it would not require remand and we could proceed under the two step process to assess its reasonableness."); *see also United States v. Grissom*, 525 F.3d 691, 696, n.2 (9th Cir. 2008) (noting that this Court has yet to address the standard of review to be applied to "procedurally unreasonable" sentenced, inasmuch as "the district court in *Gall* committed no procedural error, so only substantive reasonableness was at issue in the case. It therefore appears that the opinion leaves untouched" the standard of review applicable to questions of procedural reasonableness).

their appellate briefs in this case, the parties thoroughly analyzed the issue of the substantive reasonableness of Petitioner's sentence under the second prong of the *Gall* standard. (*See* Initial Brief at pp. 35-47; Answer Brief at pp. 31-47; Reply Brief at pp. 12-16) Yet because the Eleventh Circuit found that the district court committed "procedural" error by miscalculating the Petitioner's Sentencing Guidelines score in two respects – by under estimating the victims' "loss", and in granting the Petitioner a two-level downward adjustment based on his "acceptance of responsibility" (Addendum at pp. 20-26) – the circuit court announced (in a single line of its opinion) that it would "decline to evaluate the substantive reasonableness of [the Petitioner's] sentence." (Addendum at p. 19) *See also United States v. Livesay*, 525 F.3d 1081, 1090 (11th Cir. 2008).[16]

The Eleventh Circuit reached this conclusion even though application of the "substantive reasonableness" standard to the record on appeal would have demonstrated that the district court correctly

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[16] Ironically, the Eleventh Circuit follows this strict practice of vacating and remanding based on a district court's "procedural error," even though that court has itself recognized the "institutional advantage the district courts have in applying and weighing the § 3553(a) factors in individual cases." *United States v. Pugh*, 515 F.3d 1179, 1190-91 (11th Cir. 2008). This comports with the observation the district court made during the Petitioner's re-sentencing hearing. (Sent. Tr. at 40) (observing that "I'm probably in a better position than the Court of Appeals" to determine and weigh the § 3553 factors).

applied and analyzed the requisite sentencing factors set out in 18 U.S.C. § 3553(a), thereby rendering the purported procedural errors harmless and obviating the waste of limited judicial resources occasioned by requiring a remand and *de novo* sentencing proceeding. At the initial re-sentencing hearing, the district court in this case expressly considered each of the factors enumerated in 18 U.S.C. § 3553, paying particular attention to those most relevant to the circumstances of this case and the characteristics of the Petitioner, and making sure that even the less relevant factors were at least raised for consideration. (Sent. Tr. at pp. 39-43, 48-50) The district court also considered the testimony of the Petitioner's psychiatrist *id.* at 43-49 and of the government's expert witness. *Id.* at 14-33.

Moreover, the district court did not make one of the more egregious "procedural errors" recognized in *Gall* such as "failing to calculate the guidelines" at all, or "treating the Guidelines as mandatory[.]" *Gall v. United States*, 128 S.Ct. at 597. Instead, the district court began with a good-faith effort to get the Guidelines' calculation right. As the district court determined, however, this was not a case where the factors set out in the Guidelines provided the salient considerations driving the sentencing decision. The district judge explained that one of the required Guidelines calculation – the amount of the loss, a factor on which the circuit court found the sentencing judge erred – overstated the seriousness of the offense regardless whether the court accepted the

higher figure submitted by the government or the lower figure proffered by the defense. *Id.* at 41-42. The record in this case also demonstrates that the district court used the other Guidelines' calculation on which the circuit court found that he had erred – acceptance of responsibility – served as an appropriate proxy for other factors a district court is required to consider in the imposition of sentence under 18 U.S.C. § 3553(a)(2). *Id.* at 36-37. The district court's methodology strongly suggests that the Petitioner's sentence would have been the same whether or not the Guidelines had been calculated correctly as per the circuit court's analysis. Consistent with the "parsimony principle" embodied in the first sentence of § 3553(a), the district court then imposed upon the Petitioner the least harsh sentence consistent with the factors set out in subsection (b) of § 3553.

That the sentence imposed by the district court here would have survived scrutiny under the "substantive reasonableness" standard is bolstered by the analysis of the First Circuit in a case bearing a striking resemblance to this one, *Thurston v. United States,* 544 F.3d 22 (1st Cir. 2008) (*Thurston III*).[17] Relying on *Gall,* the *Thurston* court described just

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[17] Like the Petitioner's, Thurston's case had been reviewed and remanded three times for re-sentencing by the circuit court of appeals. *See United States v. Thurston*, 358 F.3d 41 (1st Cir. 2004) (*Thurston I*); *United States v. Thurston,* 456 F.3d 211 (1st Cir. 2006) (*Thurston II*).

how much deference appellate courts should give to a district court's decision to fashion a variance sentence – even when the appellate court views the variance as "dramatic." *Id.* ("*Gall* teaches that it is error to allow the dramatic nature of a variance to unduly influence our review for substantive reasonableness"). The defendant in *Thurston* had been convicted of conspiracy to commit Medicare fraud; the sentencing judge found an intended loss of $5 million to Medicare. Though the defendant's adjusted Guidelines' range was 63-78 months, the district court imposed a 3-month sentence of incarceration. The First Circuit vacated that sentence and remanded for reconsideration, specifically directing the district court to impose a sentence of no less than 36-months' imprisonment. *Thurston II*, 456 F.3d at 220.

On that appeal, the First Circuit went on to list two grounds that might yet justify a below-Guidelines sentence on remand. "One ground supporting a below guidelines sentence could be the intended loss attributed to [defendant] overvalues the seriousness of the offense." *Thurston II* at 219. The other was the nearly two decades that had elapsed since the defendant had committed the offense. *Id.* at 219. After the defendant filed a petition for certiorari, this Court vacated the First Circuit's decision and remanded the case to it for reconsideration in light of *Gall*. On remand, applying the *Gall* principles, the same panel that decided *Thurston II* ***affirmed*** the original 3-month sentence, observing that "*Gall* sends a clear message to reviewing courts that the sentencing

decisions of district courts should generally be respected." *Thurston III*, *supra* at p. 5.

The similarities between this case and *Thurston* are impossible to ignore. Both the Petitioner and Thurston were convicted of Medicare fraud; both convictions occurred years ago. The sentencing judges in both cases recognized that one ground for a variance sentence was that the loss to Medicare overstated the seriousness of the offense. *Thurston III* thus demonstrates why appellate courts should refrain from usurping a district court's authority to fashion a sentence that varies from the advisory Guidelines as long as it is substantively reasonable under *Gall*. *See also United States v. Lee*, No. 08-4499, 2009 WL 795157 at *4 (4th Cir. Mar. 27, 2009) (Shedd, J., concurring) (observing that "where we are presented with a single disputed guideline calculation, the question that we could have addressed in lieu of the propriety of the enhancement is whether the sentence imposed is nonetheless reasonable.")

This Court should grant certiorari to clarify that under *Gall* and its doctrinal companions, including *Kimbrough v. United States*, 128 S.Ct. 558 (2007), and *Rita v. United States*, 127 S.Ct. 2456 (2007), circuit courts should consider the "substantive reasonableness" of a district court's sentence despite mere errors in its Guidelines' calculations. *Cf. Gall v. United States*, 128 S.Ct. at 597 (rejecting that there is a "presumption of unreasonableness to a sentence outside the advisory guidelines" range).

II. The Eleventh Circuit's decision requiring the district court to impose restitution under the Mandatory Victims Restitution Act of 1996 violates the Constitutional prohibition against *Ex Post Facto* Law.

The Eleventh Circuit held that the district court in this case was ***required*** to order restitution under the Mandatory Victims Restitution Act of 1996, 18 U.S.C. § 3663A ("MVRA") and that the district court consequently erred in failing to enter an order of restitution. (Addendum at pp. 26-28) Since the Petitioner's conduct that gave rise to the claim for restitution took place before the effective date of the MVRA, the Eleventh Circuit's decision authorizes a prohibited *ex post facto* application of the mandatory restitution statute.

A. The Restitution Statutes

The Victim and Witness Protection Act, 18 U.S.C. § 3663, became effective on January 1, 1983, and authorized district courts, "for the first time, to order payment of restitution independently of a sentence of probation." *United States v. Angelica,* 859 F.2d 1390, 1392 (9th Cir. 1988). Restitution under the VWPA was discretionary and required the district court to consider the defendant's financial resources and ability to pay. 18 U.S.C. § 3663(a)(1)(A), (B).

The Mandatory Victim Restitution Act of 1996 ("MVRA"), which became effective on April 24, 1996, the date of the statute's enactment, eliminated a

district court's discretion and required restitution regardless of the defendant's financial resources or ability to pay. 18 U.S.C. § 3663A(a)(1). The MVRA requires an award of restitution for any offense against property under Title 18 "in which an identifiable victim or victims has suffered a physical injury or pecuniary loss." 18 U.S.C. § 3663A(a)-(c).

B. The Conduct Charged In This Case

The Petitioner was originally the target of a grand jury investigation at least as early as 1994. The government declined prosecution of this case in 1995. After the matter was subsequently reopened, the indictment in this case was returned by the grand jury in the District of Montana on October 28, 1997. Notwithstanding the introductory averments in the redacted indictment – the standard boilerplate language typically used in nearly all federal indictments[18] – the government has acknowledged in this case that ***all of the conduct*** underlying the conviction occurred prior to the enactment of the MVRA.[19]

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[18] Count I alleged that the conspiracy existed from May 1991 "through the date of this Indictment." Counts II and III provided that the mail fraud continued "through the date of this Indictment" although the conduct charged occurred in 1992 and 1993. (*See* Redacted Indictment at pp. 8, 20).

[19] Indeed, the sole act listed in the indictment which occurred after enactment of the MVRA relates to a $14,000 check received by Vyas from Independent Home Health Care on July

(Continued on following page)

In the proceedings below, the government consistently asserted that the VWPA, the discretionary restitution act, should apply to this case. In its brief before the Eleventh Circuit, the government originally conceded that "this case falls ***before*** the Mandatory Victim Restitution Act[.]" (*See* Brief for the Appellant United States at p. 20 (emphasis added).[20] The government began its argument in its initial appellate brief by stating:

> The convictions here all involved ***conduct occurring prior to 1996 when the Mandatory Victims Restitution Act became effective.*** Under the prior Victim and Witness Protection Act, the court "may" make an order of restitution, and in determining whether to do so, it "shall" consider the loss to each victim and the financial ability of the defendant. 18 U.S.C. § 3663 (a)(1)(A) & (B). The court may also decline to order restitution where the "complication and prolongation of the sentencing process . . .

31, 1996. (*See* Redacted Indictment at ¶80, p. 16). This was well after the alleged conspiratorial conduct had ceased, and even well after another prosecutor had investigated, interviewed Mr. Gupta, and declined prosecution in 1995. (*See* Brief for the Appellant United States at p. 8).

[20] Similarly, in setting out the standard of review for the Eleventh Circuit to employ on the restitution issue, the government's brief described the "decision to decline an order of restitution under the prior Victim and Witness Protection Act" as discretionary.

> outweighs the need to provide restitution to any victims." 18 U.S.C. § 3663(a)(1)(B)(ii).

(*See* Initial Brief for the Appellant United States at p. 33) (emphasis added).

C. Application of the MVRA to the Petitioner Violates *Ex Post Facto* Principles.

Article 1, section 9, clause 3 of the United States Constitution prohibits Congress from enacting any *ex post facto* law. Included among laws that run afoul of the *ex post facto* proscription is any law that "changes the punishment, and inflicts a greater punishment, than the law annexed to the crime when committed." *Miller v. Florida*, 107 S.Ct. 2446, 2450 (1987) (internal quotation omitted); *accord Lynce v. Mathis*, 117 S.Ct. 891, 895 (1997). "The *Ex Post Facto* Clause flatly prohibits retroactive application of penal legislation." *Lynce v. Mathis*, 117 S.Ct. at 895 n.12. A "restitution" statute imposes a "penalty" upon an offender and, thus, constitutes penal legislation. *See Kelly v. Robinson*, 107 S.Ct. 353, 356, 360 n.10 (1986); *cf. Austin v. United States*, 113 S.Ct. 2801 (1993) (civil *in rem* forfeiture statute also constitutes a penal law). It necessarily follows then that restitution statutes are subject to the Constitutional prohibition against *ex post facto* laws.[21]

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[21] Despite the seemingly ineluctable nature of this logic, not all the circuits agree that restitution statutes are subject to the

(Continued on following page)

Here, aside from the "stock" averments of the redacted indictment that the conspiracy and scheme to defraud continued through the date of the indictment, it is clear that all alleged illegal conduct ceased well before enactment of the MVRA – as the government initially acknowledged. The bulk of the activities charged in the redacted indictment took place in 1991 through 1994, and Blue Cross Blue Shield conducted its final audit of Independent Home Health Care on August 20, 1995 for the May 8, 1994 cost report. (*See* Redacted Indictment at ¶71, p. 14).[22]

Constitutional prohibition on *ex post facto* law. *Compare United States v. Schulte*, 264 F.3d 656, 661-662 (6th Cir. 2001) (restitution statute subject to *ex post facto* analysis); *United States v. Edwards*, 162 F.3d 87, 89-90 (3d Cir. 1998) (same); *United States v. Baggett*, 125 F.3d 1319, 1322 (9th Cir. 1997) (same); *United States v. Williams*, 128 F.3d 1239, 1241 (8th Cir. 1997), and *United States v. Thompson*, 113 F.3d 13, 15 n.1 (2d Cir. 1997) (same) (dictum), with *United States v. Newman*, 144 F.3d 531, 538 (7th Cir. 1998) (retroactive application of restitution statute does not violate the *Ex Post Facto* clause); *United States v. Nichols*, 169 F.3d 1255, 1279-1280 (10th Cir. 1999) (same). This division among the circuit courts of appeals itself presents an issue meriting resolution by this Court, thus warranting a grant of certiorari in this case.

[22] Any conduct alleged in the indictment that took place after the MVRA's enactment was *de minimis*, involving activity occurring long after the charged conspiratorial conduct had ceased – indeed well after another federal prosecutor had investigated the case, interviewed the Petitioner, and declined prosecution back in 1995. *See* Redacted Indictment at ¶80, p. 16 (relating to a check received from Independent Home Health Care on July 31, 1996).

Consequently, application of the mandatory restitution provision of that Act to The Petitioner ran afoul of the *Ex Post Facto* Clause.[23] Since the similar issues regarding the application of the MVRA are likely to arise in other cases, and since this issue addresses an important principle of federal Constitutional law, this Court should grant a writ of certiorari and reverse the Eleventh Circuit Court of Appeals on this issue.

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[23] Like other punitive statutes, the MVRA may be applied to criminal conduct that straddles the statute's effective date – conduct, that is, that began before its effective date but continued thereafter – without running afoul of the Constitutional *ex post facto* prohibition. *See United States v. Futrell*, 209 F.3d 1286, 1288 (11th Cir. 2000). In *Futrell*, there was proof that the defendant engaged in actual illegal conduct underlying the conviction after the effective date of the Act. The indictment charged Futrell with making false statements from January 1994 through March 1997, and charged his wife with one count of making a false declaration under oath to a federal grand jury before the return of the indictment in 1998.

CONCLUSION

For all of the foregoing reasons, the Petitioner respectfully requests that this Petition be granted and that this Court issue a writ of certiorari to the Eleventh Circuit Court of Appeals to review its opinion in this case.

Respectfully submitted,

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[PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 08-12248

D. C. Docket No. 98-016118-CR-KLR

UNITED STATES OF AMERICA,

Plaintiff-Appellant,

versus

MAHENDRA PRATAP GUPTA,
CARDINAL CARE, INC.,
MARSHAL MEDICAL SERVICES, INC.,

Defendants-Appellees.

Appeals from the United States District Court
for the Southern District of Florida

(June 23, 2009)

Before BARKETT and PRYOR, Circuit Judges, and EDENFIELD,* District Judge.

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* Honorable B. Avant Edenfield, United States District Judge for the Southern District of Georgia, sitting by designation.

PRYOR, Circuit Judge:

This third appeal by the United States, *see United States v. Gupta* (*Gupta II*), 463 F.3d 1182, 1188 (11th Cir. 2006); *United States v. Gupta* (*Gupta I*), 363 F.3d 1169, 1170 (11th Cir. 2004), involves fundamental errors about the resentencing of Mahendra Gupta, who was convicted a decade ago of Medicare fraud involving millions of dollars, and an overarching issue about whether to reassign the case to a different district judge to conduct a fourth sentencing hearing. The United States argues that the district court erred in applying the Sentencing Guidelines, abused its discretion when it declined to order restitution, and imposed an unreasonable sentence, and the United States, for the second time, *see Gupta I*, 363 F.3d at 1177, urges us to reassign the case to preserve the appearance of impartiality. Because we agree with the United States about the procedural errors in applying the Guidelines, the statutory mandate of restitution, and the need for reassignment, we need not evaluate the substantive reasonableness of Gupta's sentence. We vacate Gupta's sentence and remand for resentencing with an instruction that the case be reassigned to a different district judge.

I. BACKGROUND

In September 1997, a federal grand jury in the District of Montana indicted Gupta, three other persons, Allegheny Management Company, and ten home healthcare agencies on 16 counts stemming

from Medicare fraud. *Gupta I*, 363 F.3d at 1170-71. The indictment charged that the defendants violated the related-party regulation, 42 C.F.R. § 413.17, which required home healthcare agencies to report services provided by related companies and provided that, subject to cost caps, Medicare would reimburse the agency for only the cost, not the profits, to the related company.

Gupta's fraud was complicated and extensive. By using "false claims, straw owners, and other deceptive actions to conceal the close relationship between the various persons[,]" *Gupta I*, 363 F.3d at 1170-71, Gupta positioned himself on both sides of consulting contracts between Allegheny and the home healthcare agencies, charged the agencies a higher price for the contracts and services he provided through Allegheny, and obtained reimbursement of that profit from Medicare. *See Gupta II*, 463 F.3d at 1188.

Edward Quinlan, one of the other individual defendants, was the putative owner of Allegheny, but Gupta created, funded, and profited from the management company. *Id.* Through Allegheny, "Gupta was able to charge Medicare between $50 and $150 per hour for the employees' services as opposed to approximately $17 per hour. In the first six months of Allegheny's business operations, it billed Gupta-owned health care agencies more than $1 million for consulting." *Id.* at 1188 n. 4. Between 1991 and 1997, the home healthcare agencies claimed reimbursement for Gupta's and Allegheny's consulting fees without

disclosing the relationships between the parties. *Id.* at 1190. "From 1991 to 1997, Medicare reimbursed Corporate Defendants and [one of the dismissed corporate defendants] more than $15 million in Allegheny's fees." *Id.* Some of Gupta's straw owners were family members, including Gupta's father, Chandra Shekhar; his brother, Vijay Gupta; and his brother's in-laws, Dev Raj and Shanno Devi, who may have supported Gupta in exchange for immigration assistance. *See id.*

In July 1998, the case was transferred to the Southern District of Florida. *Gupta I*, 363 F.3d at 1171. The district court severed the trial of one individual defendant and the three home healthcare agencies he owned, and the government later dismissed the charges against those four defendants. *Id.* at 1171 & n. 3. The district court also dismissed all charges against two other home healthcare agencies.

Gupta, Quinlan, Kuldeep K. Hajela, Allegheny, and five home healthcare agencies proceeded to trial. The district court dismissed 13 counts of the indictment, which left only one count of conspiracy to defraud Medicare, 18 U.S.C. § 286, and two counts of mail fraud, *id.* §§ 1341, 1342, for trial. *Gupta I*, 363 F.3d at 1171. Before trial, the government submitted an expert report prepared by federal auditor Gary Young, who opined that Allegheny received approximately six million dollars in profits over a six-year period from consulting fees paid by related agencies. Trial commenced in October 1999. At the close of the government's case, all nine defendants moved for a

judgment of acquittal. The district court granted Hajela's motion and reserved ruling on the motions of the other defendants. *Id.*

On November 5, 1999, the jury acquitted Quinlan and convicted Gupta, Allegheny, and the five home healthcare agencies. *Id.* Gupta, Allegheny, and the home healthcare agencies requested an extension of "at least three weeks" to file post-verdict motions, and the district court granted their request. *Id.* On November 29, 1999, Allegheny again moved for a judgment of acquittal, and on December 3, 1999, Gupta and the home healthcare agencies moved for a judgment of acquittal or, in the alternative, for a new trial. *Id.* at 1172. On January 27, 2000, the district court denied all pending post-trial motions. *Id.*

The presentence investigation reports also were disclosed in late January 2000, but sentencing was continued several times. *Id.* Gupta's report assigned a base offense level of six, with an additional 14 levels because the loss, according to the Young report, was more than five million dollars but not more than ten million dollars, United States Sentencing Guidelines § 2F1.1(b)(1)(O) (Nov. 1999), two levels because the offense involved more than minimal planning, *id.* § 2F1.1(b)(2)(A), and four levels because Gupta was "an organizer or leader in a criminal activity that involved five or more participants or was otherwise extensive[,]" *id.* § 3B1.1(a), for a total offense level of 26. The report stated that the guideline range was 63 to 78 months of imprisonment with two to three years of supervised release and that Gupta could afford to

pay a fine and restitution. Because Allegheny and the home healthcare agencies had repaid Medicare 1.2 million dollars, the report deducted that amount from the loss to Medicare calculated by Young and stated that "[r]estitution is owed to Medicare in the amount of $4,987,173." Gupta was 54 years old when the report was disclosed and disclaimed any history of mental or emotional problems, although he complained of anxiety and nausea.

Gupta objected to the calculation of the loss that formed the basis for the 14-level enhancement and the enhancements for more than minimal planning and a leading role in a criminal activity that involved five or more participants or was otherwise extensive. Gupta submitted an expert report prepared by Stanley Foodman, a certified public accountant, to substantiate his objection to the loss amount. Foodman opined that Medicare was not owed restitution because it did not reimburse the home healthcare agencies for any Allegheny profits. Gupta also objected to the lack of a downward adjustment for acceptance of responsibility and argued that "a downward departure . . . is warranted" because "a level 26 . . . 'severely over-represents' the seriousness of the offense[,]" "the loss calculations vastly overstate the seriousness of the offense, the offense in which [he] was convicted is no longer a crime[,]" and he offered "extraordinary service to others[.]"

On January 25, 2001, Gupta and the five home healthcare agencies asked the district court to reconsider its denial of their 1999 motions for judgment of

acquittal or a new trial. The government responded that the motion was untimely. The district court did not rule on that motion until more than a year and a half later.

On January 26, 2001, the district court held its first sentencing hearing. The district court stated that it would not allow the four-level enhancement for a leading role in a criminal activity that involved five or more participants or was otherwise extensive because "[the fraud] may have extended across the country but it was a very simple thing with regard to whether you check off the, whether it is a related company." The district court did not impose any sentence and took the motions for judgment of acquittal under advisement. The government submitted a sentencing memorandum and moved the court to appoint an independent auditing expert. The district court did not appoint the expert and continued sentencing again, until September 2002, and then again, until the next month.

On October 16, 2002, almost three years after the original post-verdict motions were filed, the district court entered judgments of acquittal for Gupta and the five home healthcare agencies. For reasons that remain unclear, the district court also entered a judgment of acquittal for Allegheny even though Allegheny had never asked the district court to reconsider the earlier denial of its motion. *Gupta I*, 363 F.3d at 1172. The government appealed and argued that the district court lacked jurisdiction to entertain the motions because they were untimely

under Federal Rules of Civil Procedure 29 and 33. *Id.* The government also requested a reassignment to a different district judge. *Id.* at 1177.

In March 2004, we ruled that the district court lacked jurisdiction to consider the late motions, vacated the judgments of acquittal, reinstated the jury verdicts, and remanded the case for resentencing, but we declined to order a reassignment on remand. *Id.* at 1176-77. We rejected the argument of the government that "a supposedly too-light sentence . . . would be 'preordained'" and stated that "there is no reason to doubt [the] judgment or impartiality [of the district judge]." *Id.* at 1177. We concluded that reassignment would "require significant and unnecessary use of judicial resources." *Id.*

On remand, the government filed a second sentencing memorandum and expert reports about loss prepared by Jeff Litvak and Shirill Garvey. *Gupta II*, 463 F.3d at 1195-96. Litvak calculated the profits Allegheny received from the home healthcare agencies. He opined that the loss to Medicare was 3.4 million dollars. *Id.* at 1196.

On November 5, 2004, the district court held a second sentencing hearing. The district court sentenced Gupta to three years of probation on each conviction, to run concurrently, and fined him $10,000. *Id.* at 1186. The district court sentenced the five home healthcare agencies to three years of probation. The district court fined only two of the agencies, Marshal Medical and Cardinal Care,

because the other three businesses were closed. *Id.* Gupta and the five agencies were excluded from Medicare programs for five years. *Id.*

The district court imposed these sentences reluctantly and restated its view that no wrongdoing had occurred. The district court expressed concern that the hospital that provided some of the same services the Gupta agencies had provided charged more for those services:

> [A]ll you did was throw out a home provider that charged less for us and got somebody who charged more. And if the government isn't concerned about it, I don't think anybody's suffered any loss, certainly not the government because they don't mind paying more money than they were paying before.

The government argued that the measure of the loss was the profit for which Allegheny was reimbursed by Medicare and offered testimony from Litvak to that effect, but "[t]he [district] court denied the government's request to include the Litvak loss report in the sentencing record[,]" *id.* at 1196, and again stated that there was no loss to the government. The district court also stated, "Well, I've been through this before. And I made a decision back then. And I said I'm not going to find any loss. And I'll stand by that. . . . [T]he 11th Circuit can sort it all out for us." The government urged the district court to impose a sentence that included some confinement to deter other potential fraudsters from using "false invoices and false letters" and "straw people" to take "very deceptive"

actions that "hid[e] the relationship between these parties." The district court reiterated its view that "no crime has been committed" and stated that "it's amazing to me that somebody could be convicted of a felony based upon a bureaucratic regulation. Now I know you say, Well, he made a false statement and/or mail fraud or something."

Gupta and the home healthcare agencies appealed their convictions and the government cross-appealed the sentences. *Id.* The government challenged the sentences on three grounds: (1) the district court failed to consider and enhance Gupta's sentence on the basis of Gupta's leading role in the extensive fraud; (2) the district court failed to calculate loss; and (3) the sentences were substantively unreasonable. The government did not request restitution. Gupta responded that an enhancement for a leading role in extensive criminal activity was unwarranted because the fraud was not extensive; the district court correctly calculated a loss of zero; and the sentences were substantively reasonable because the cost of the consulting services was below the Medicare cost caps and the related-party regulation no longer exists.

We affirmed all of the convictions and some of the sentences, but we granted the request of the government to vacate and remand the sentences for Gupta and two home healthcare agencies, Marshal Medical and Cardinal Care. *Id.* at 1200; *see also id.* at 1195-1200. We ruled that the district court erred when it declined to apply a leading-role enhancement

to Gupta's sentence on the ground that Gupta's scheme was not "otherwise extensive." *Id.* at 1199. We stated that, "[c]ontrary to Gupta's assertions, the criminal activity was quite complex and is not susceptible to simple categorization as the failure to check a box on a medicare form." *Id.* at 1198. We remanded for the district court to determine whether Gupta was the leader or organizer of the scheme.

We ruled that the finding of zero as the amount of loss was error for all defendants. *Id.* at 1200. We stated that the district court erred when it "found that the loss was determined as the amounts by which each of the [corporate defendants] exceeded the applicable Medicare reimbursement caps, which was equal to zero as such companies operated . . . below the applicable caps." *Id.* at 1199. We rejected the reasoning of the district court that "the government did not mind paying up to such caps" because a "'no harm, no foul' argument . . . [was] an insufficient rationale by which to calculate loss." *Id.* at 1199, 1200. We stated that "the amount the Government paid in response to the false claims is an appropriate measure of damages." *Id.* at 1200. We remanded for the district court to award damages.

On remand, the government argued that the district court should calculate loss by determining the amount of profit to Allegheny that the related-party regulation prohibited. The government argued that Litvak's estimation of loss was reasonable and that the report prepared by Foodman was inaccurate because Foodman did not attend the trial, used figures

from internal revenue audits that did not consider the fraud in the case, and included as expenses fraudulent transfers from Allegheny to other companies. The government also contested Foodman's conclusion that the government sustained no real loss because Allegheny was paid the market rate on the grounds that market rates are irrelevant in fraud cases and the assumption that Allegheny provided only legitimate services is unsound. The government urged the district court to impose a sentence within the guidelines range of 57 to 71 months of imprisonment because other potential fraudsters would not be deterred if Gupta received only probation for his complex scheme.

Gupta argued that we "misapprehended the basis for [the district court's] finding that there was no loss to Medicare in this case[,]" and that no loss occurred because "Allegheny made *no profit* on the work it did for Mr. Gupta's agencies." Gupta urged the district court not to adopt an "unfair . . . focus on loss" and to "err on the side of caution." Gupta argued for a downward departure from the guidelines range on the grounds that "the loss calculations vastly overstate the seriousness of the offense[,]" "[he] did not personally profit from the violations[,]" and "[his] personal characteristics warrant a downward departure." Gupta also argued that a downward variance was warranted because "the violations in this case took place . . . more than a decade ago"; "a new rule promulgated by [a federal agency] . . . abolished the . . . related party regulation"; letters provided "a

glowing tribute to his extraordinary service to others"; he suffers from "bipolar mood disorder, alcohol dependency, depression, hypertension, hypothyroidism, gastritis, and other physical and emotional ailments"; a custodial sentence was not necessary to protect the public from businesses that had closed; and he, at almost 63 years of age, would be deterred without going to jail. Gupta urged the district court to impose a sentence of probation.

In March 2008, the district court held a third sentencing hearing. The district court stated that Gupta's base offense level was six with a two-level enhancement for more than minimal planning and a four-level enhancement for a leading role in an extensive offense. The district court stated that "[t]here's a lot of leeway going either way" between the Litvak and Foodman reports about loss and that "we have this range of 3.4 million down to zero between people who I assume all have good credentials and have made an analysis." The district court stated that it "detect[ed] advocacy on both sides."

The district court could not recall whether it had sentenced Allegheny and, upon being told that it had, suggested that it was confused about the moniker "defendant" for the purposes of the loss calculation. Although the district court was supposed to be sentencing Gupta, the parties were calculating loss by determining the gain or loss to Allegheny. The government explained, with no objection from Gupta's counsel, that we had upheld the finding of the jury that Gupta exercised control over Allegheny's profits,

see Gupta II, 463 F.3d at 1190-93, and that Gupta, for example, once used those profits to pay a personal debt to a diamond merchant.

After Litvak testified, the district court expressed frustration and adopted a Solomonic approach of splitting the baby to fix the amount of loss:

> You know, this isn't going to help me a whole lot. I've read these reports and figures until my eyes are going blind trying to understand all of this. I'm sure there's advocates on both sides. The Court says that – and the guidelines don't say that – the Court has to make a reasonable estimate of the loss. I'm sure there was some loss. I think the government has overstated it. The defense has probably understated it. It's not a matter of restitution in this Court. I'm not going to award restitution. I'm going to let the Board decide those issues.
>
> I'm just going to pick a figure, like any jury would, about half way in between. And I'll pick 1 million 5, and that will be the amount that is a reasonable estimate, I guess, that I make.

The district court used the 1998 Sentencing Guidelines to calculate an 11-level enhancement for the amount of loss, for a total offense level of 23.

The district court *sua sponte* asked defense counsel whether Gupta would accept responsibility: "The appellate court has now determined that this was a related company. Does he wish to accept

responsibility at this time? He has no other place to go." Defense counsel replied, "I mean, in hindsight now, since there has been a determination by the jury and by the 11th Circuit . . . that they were related parties, then I think it's fair to say he accepts responsibility for that."

The government stated that "an acceptance of responsibility here is absurd[,]" but the district court disagreed because it "thought [during earlier proceedings] that there might not be a crime." The district court reduced Gupta's offense level by two points, to 21. The government asked that Gupta personally articulate his acceptance of responsibility, but the district court declined the request. The district court stated that the guidelines range was 37 to 46 months of imprisonment.

The district court next considered Gupta's request for a downward departure. The district court stated that it must "determine what a fair and reasonable sentence would be" under the governing statute, 18 U.S.C. § 3553(a). The district court recalled that there had been "two refusals to prosecute this by other U.S. Attorneys, one in Chicago and one in Montana[,]" and "the regulation that was so obscure – I don't remember which one it was that was written by some bureaucrat. And they said it ought to be clarified. And the government said, Don't clarify. It gives us more flexibility that way." Defense counsel reiterated that the related-party regulation was withdrawn in 2001, the government recalled testimony from trial that Gupta knew that he was

committing a crime, and the district court stated that it could consider the abolition of the related-party regulation as part of the "nature and circumstance of the offense" factor under section 3553. The district court stated that it "s[aw] that, this was not an act of greed" because Gupta "could have made these charges a lot more and still been within the cap. And the Government would have willfully paid it." The district court recalled testimony that Gupta had not controlled Allegheny and stated, "But the Court [of Appeals] said that he did control it. So we have to deal with that."

The district court reiterated its belief that Gupta's criminal activity had been overstated:

> I would find that I think that the amount of money overstates the seriousness of this particular crime. I think you see what a mess we've had trying to even figure it out. And I even have accountants who are willing to come in and say that there was no loss. Obviously, the 11th Circuit is saying you can't find that there was no loss. There had to be some loss. So I've taken my best estimate, a reasonable estimate based upon the wide disparity of opinions. And I still think that the amount of loss overstates the seriousness of the crime.

The district court stated that "[it] really d[id]n't see what can be accomplished with a man of this age, putting him in jail" and mentioned an appeal involving a child pornography conviction in which we

rejected a sentence of probation because, in the words of the district court, "there are some real victims there."

The district court stated that "a reasonable downward departure would be to about a level 12" and first considered a sentence of probation with home confinement. Upon determining that incarceration is required for level-12 offenses, the district court next considered a sentence of imprisonment for ten months. Before the district court imposed sentence, defense counsel suggested that the district court depart an additional two levels downward, which would permit a sentence of probation with home confinement. The district court heard testimony from Dr. David Rooney, Gupta's psychiatrist, about how Gupta had been hospitalized, possibly for problems related to his alcohol dependency, and how "incarceration would have a negative affect on his well being with regards to his need for treatment . . . of bipolar mood disorder." The district court "fe[lt] that due to the nature of this thing, that confinement would just be very hazardous to [Gupta's] health" and departed downward to a level ten.

The district court imposed a sentence of three years of probation, including 12 months of home confinement, and fined Gupta $25,000. The government requested restitution, but the district court stated that "[r]estitution is going to be decided by [the Provider Reimbursement Review Board]."

The government appealed. Although the government designated Gupta, Cardinal Care, and Marshal Medical as appellees, it says nothing in its brief about the sentences of the home healthcare agencies. The government has abandoned any argument about those sentences, and we need not review them. *United States v. Lopez-Vanegas*, 493 F.3d 1305, 1309 n.6 (11th Cir. 2007).

II. STANDARDS OF REVIEW

We review findings of fact for clear error and application of the sentencing guidelines *de novo*. *United States v. Jackson*, 276 F.3d 1231, 1233 (11th Cir. 2001). "A factual finding is clearly erroneous when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *United States v. Robertson*, 493 F.3d 1322, 1330 (11th Cir. 2007) (internal quotation marks omitted). "Although review for clear error is deferential, a finding of fact must be supported by substantial evidence." *Id.* "When a defendant challenges one of the factual bases of his sentence . . . the Government has the burden of establishing the disputed fact by a preponderance of the evidence. This burden must be satisfied with reliable and specific evidence." *United States v. Sepulveda*, 115 F.3d 882, 890 (11th Cir. 1997) (internal quotation marks and citation omitted). We review a decision not to award restitution for abuse of discretion. *United States v.*

Remillong, 55 F.3d 572, 574 (11th Cir. 1995) (per curiam).

III. DISCUSSION

Our discussion of this appeal is divided in three parts. We first discuss the failure of the district court to calculate the guidelines range correctly; we next discuss restitution; and we then discuss reassignment of this case to a different district judge. Because we conclude that a remand is necessary to correct procedural errors, we decline to evaluate the substantive reasonableness of Gupta's sentence. *See United States v. Collins*, 915 F.2d 618, 622 (11th Cir. 1990). "We do not know what sentence the district court will impose on remand. Thus, we would be rendering an advisory opinion if we were to pick a sentence and declare it to be reasonable." *Id.*

A. The District Court Erred When It Calculated the Guidelines Range.

The district court committed two procedural errors when it calculated the guidelines range. First, it failed to calculate loss. Second, it erroneously reduced Gupta's offense level by two points for acceptance of responsibility. We discuss each error in turn.

1. The District Court Failed To Calculate Loss.

The "loss is the greater of actual loss or intended loss." U.S.S.G. § 2B1.1 cmt. 3(A); *United States v. Manoocher Nosrati-Shamloo*, 255 F.3d 1290, 1291 (11th Cir. 2001) (per curiam). "Actual loss" is the monetary harm that resulted from the offense and was reasonably foreseeable, U.S.S.G. § 2B1.1 cmt. 3(A)(I), (iii), and "intended loss" is the monetary harm "that was intended to result from the offense," *id.* cmt. 3(A)(ii), (iii).

"The court need only make a reasonable estimate of the loss[,]" *id.* cmt. 3(c) but "courts must not speculate concerning the existence of a fact which would permit a more severe sentence under the guidelines." *Sepulveda*, 115 F.3d at 890 (internal quotation marks omitted). "[A] district court must make factual findings sufficient to support the government's claim of the amount of fraud loss attributed to a defendant in a [presentence investigation report]." *Gupta II*, 463 F.3d at 1200. "We must decide whether the district court erred by finding . . . that the loss attributable to [Gupta] could be reasonably estimated without impermissible speculation at [1.5 million dollars]." *Sepulveda*, 115 F.3d at 890-91.

The government argues that "[t]he district court's calculation of loss here was the very definition of speculation. The court merely picked a figure out of thin air . . . that was roughly between the parties' estimates of $0 and $3.4 million." The government

identifies five issues about loss that the district court failed to resolve or even to discuss: (1) whether loss should be calculated using pretax or posttax income of Allegheny; (2) whether loss should be calculated by including in the income of Allegheny fraudulent expenses that had no benefit to the Medicare program; (3) what percentage of the income of Allegheny was derived from the defendant home healthcare agencies instead of three other home healthcare agencies owned by Gupta's brother, Vijay; (4) whether loss should be calculated by including in the income of Allegheny "bad debts" Allegheny owed to the home healthcare agencies; and (5) whether loss should be calculated by including in the income of Allegheny $400,000 that the Montana home healthcare agency paid in response to repayment demands from the government, or whether that money should be characterized as restitution.

Gupta states that "there is no dispute about the correct methodology of determining whether there was a loss to Medicare" and acknowledges that "any 'loss' to Medicare could only be the amount of the profit made by Allegheny on the services provided to the defendant Home Healthcare Agencies." Gupta does not discuss the failures of the district court that the government mentions. Gupta again relies on the finding by Foodman that "Allegheny had earned no profit from the Defendant home health agencies." Gupta attacks various assumptions of the Litvak report, argues that the government failed to provide reliable and specific evidence of the amount of loss,

and argues that the district court "evaluat[ed] the strengths and weaknesses of both experts' theories on loss."

The government replies that "splitting the difference between a credible loss estimate and an incredible loss estimate is not reasonable." The government also replies that meaningful appellate review requires the appellate court to be able to reconstruct the reasoning of the district court, which is impossible when the district court simply "picks" a number between the parties' estimates. We agree with the government.

The district court failed to calculate loss, and the district court failed to make factual findings about several key issues. Although the district court considered both Foodman's and Litvak's expert reports, the district court failed to resolve any of the five issues the government raised about how to calculate the loss. Litvak testified that Foodman had erroneously relied on figures from a federal tax audit of Allegheny that would have been different if the Internal Revenue Service had known that Allegheny was related to the home healthcare agencies, and the district court also failed to resolve this issue. "[T]he district court clearly erred when it did not make specific factual findings upon which to base the loss amount[]." *United States v. Medina*, 485 F.3d 1291, 1304-05 (11th Cir. 2007).

The error of the district court is not limited to its failure to make findings about these key issues. The

cursory statements of the district court suggest that the district court made no findings about anything at all. The district court stated that it just "pick[ed] a figure, like any jury would, about half way in between."

The district court employed an arbitrary approach. It did not make a calculation. The district court described the loss amount of 1.5 million dollars as "the amount that is a reasonable estimate, I guess, that I make." There is no basis for the amount of 1.5 million dollars other than that it is "about half way in between" the parties' estimates. Even this basis cannot fully explain the amount: 1.5 million dollars is more than 10 percent below the halfway mark between the parties' estimates.

The arbitrary decision by the district court makes a difference. The decision spared Gupta one point on his offense level: a finding of $1,500,001 in loss would have required an additional point. The decision also precluded an accurate determination of restitution, which depends on the amount of pecuniary loss. *See* 18 U.S.C. § 3663A(b)(1)(B) (providing that the amount of restitution depends on the amount of the loss).

Because the district court identified no basis for the loss amount it found, meaningful appellate review of the amount is impossible. "Without further information from the district court, we cannot determine what factual basis was used to reach the

conclusion. . . ." *Medina*, 485 F.3d at 1304. A remand is necessary.

2. The District Court Erred When It Reduced Gupta's Offense Level for Acceptance of Responsibility.

The Sentencing Guidelines provide a reduction in a defendant's offense level by two points "[i]f the defendant clearly demonstrates acceptance of responsibility for his offense." U.S.S.G. § 3E1.1(a). The reduction "is not intended to apply to a defendant who puts the government to its burden of proof at trial by denying the essential factual elements of guilt, is convicted, and only then admits guilt and expresses remorse." *Id.* § 3E1.1, cmt. n.2. When a defendant exercises his constitutional right to a trial without denying essential factual elements of his guilt, the reduction may apply. *Id.* Application of the reduction "will not be overturned unless it is without foundation[,]" *United States v. Castillo-Valencia*, 917 F.2d 494, 500 (11th Cir. 1990), but "[Gupta] bears the burden of clearly demonstrating acceptance of responsibility." *United States v. Sawyer*, 180 F.3d 1319, 1323 (11th Cir. 1999).

The government argues that the reduction is "egregious . . . because Gupta never requested the reduction, and the Probation Office did not recommend it." The government argues that "there is no record of what responsibility Gupta accepted" and Gupta "contested every aspect of the prosecution[,]" including

two essential factual elements of guilt: intent and control.

Gupta argues that he raised the issue of the reduction in his objections to the presentence investigation report, and that "[he] through counsel accepted responsibility for his crimes" at sentencing. Gupta argues that the reduction applies because he attempted "to resolve the Allegheny management fees on the basis of actual costs" during administrative proceedings before the Provider Reimbursement Review Board, his criminal conduct ended over a decade ago, and he stopped participating in any Medicare businesses. Gupta also argues that any error is harmless because the district court could have imposed a less severe sentence even if the reduction does not apply.

The district court clearly erred when it reduced Gupta's sentence for acceptance of responsibility. Gupta put the government to its burden at trial, contested two essential elements of his guilt, moved to vacate his conviction, and then appealed the reinstatement of the jury verdict. Gupta could not have made clearer that he thought he was innocent.

Nothing in the record supports an adjustment for acceptance of responsibility. Gupta allegedly "accepted responsibility" when the district court prompted him by stating that "[h]e ha[d] no other place to go," but Gupta's "acceptance" was explicitly based on the conclusions of our Court. Gupta's counsel stated, "I mean, in hindsight now, since there

has been a determination by the jury and by the 11th Circuit . . . that they were related parties, then I think it's fair to say he accepts responsibility for that." That statement does not even make clear for what Gupta "accepted responsibility" or that he is remorseful.

B. The District Court Abused Its Discretion When It Declined To Order Restitution.

Although the presentence investigation report recommended it, restitution was not an issue in previous appeals because the district court found zero loss. The government has raised the issue now that the district court has found some loss but declined to order restitution on the ground that the issue would be decided by the Provider Reimbursement Review Board. The government argues that restitution is required by the Mandatory Victims Restitution Act of 1996, 18 U.S.C. § 3663A, and is not before the Provider Reimbursement Review Board. Gupta argues that restitution is within the discretion of the district court and that the Provider Reimbursement Review Board is in a better position than the district court to order restitution.

The district court must order restitution. Gupta's conduct is covered by the Mandatory Act, which requires district courts to order restitution without regard for a defendant's ability to pay when an identifiable victim suffers a pecuniary loss. *Id.* Although the Mandatory Act ordinarily does not apply to

offenses that occurred before it became effective on April 24, 1996, *United States v. Siegel*, 153 F.3d 1256, 1258-60 (11th Cir. 1998), the Act applies to conspiratorial offenses that began before that date but concluded after it. *United States v. Futrell*, 209 F.3d 1286, 1290 (11th Cir. 2000) (per curiam) ("The ongoing nature of the conspiracy enables application of the new statute without violating the Ex Post Facto Clause.").

The conspiracy in which Gupta was convicted of participating began before April 24, 1996, and continued beyond that date. Three counts of the indictment charged conduct that continued after April 24, 1996. The first count, the Medicare fraud count, charged conspiracy to submit false claims, 18 U.S.C. § 286, between May 1991 and September 22, 1997. The second and third counts charged mail fraud, *id.* §§ 2, 1341, between September 1991 and September 22, 1997. The government also proved that specific instances of conspiratorial conduct occurred after April 1996. The government proved that Gupta paid a straw owner in July 1996 after selling one of the dismissed corporate defendants to a hospital at a profit. On remand, the district court must determine how much is owed and order Gupta to pay restitution.

C. The Case Must Be Reassigned to Another District Judge.

"We have the authority to order reassignment of a criminal case to another district judge as part of our

supervisory authority over the district courts in this Circuit." *United States v. Torkington*, 874 F.2d 1441, 1446 (11th Cir. 1989) (per curiam). Reassignment is an extraordinary order, and we "do not order [it] lightly." *Id.* at 1447. "[W]here there is no indication of actual bias[,]" we consider at least three factors to determine whether to reassign a case: "(1) whether the original judge would have difficulty putting his previous views and findings aside; (2) whether assignment is appropriate to preserve the appearance of justice; (3) whether reassignment would entail waste and duplication out of proportion to gains realized from reassignment." *Id.* Reassignment is necessary when a district judge adheres to erroneous views after multiple remands, *see United States v. Martin*, 455 F.3d 1227, 1242 (11th Cir. 2006) (ordering reassignment after second appeal, when district court changed sentence from probation to seven days of imprisonment), or when a judge "question[s] the wisdom of the substantive law he ha[s] to apply and challenge[s] the government's decision to prosecute [the defendant,]" *Torkington*, 874 F.2d at 1447 (ordering reassignment after second appeal, when district court "dismissed the case at the first opportunity by construing a motion for mistrial as a motion for entry of judgment of acquittal[,]" stated that the prosecution was "silly," and "demonstrated great difficulty in putting aside his prior conclusions about the merits of this prosecution").

The government argues that "[t]he greatest casualty in this proceeding is the appearance of a lack

of impartiality"; the straightforward errors in calculating the guidelines range demonstrate that the district court "is willing to commit obvious error in order to avoid sentencing Gupta to a term of incarceration"; and reassignment would produce little duplication because "the district court has done little or nothing of record on the issue of loss," and, in any event, "retains only snippets of [the] long-ago proceeding [of the trial]." Gupta argues that the district court followed our mandate and there is no evidence that the district court is biased. Gupta also argues that sentencing on remand would not be predetermined because "the transcript of sentencing and the record clearly reflect that [the district court] carefully reviewed the extensive written submissions, heard argument and testimony, and took into consideration the presentence report."

Although "[w]e do not question the district judge's actual ability, integrity and impartiality[,]" we order this case reassigned because "the trial judge has demonstrated great difficulty in putting aside his prior conclusions about the merits of this prosecution." *Id.* At the third sentencing hearing, the district court adhered to its erroneous belief that Gupta's behavior was not criminal, emphasized that other federal prosecutors had declined to prosecute Gupta, disparaged the merits of his prosecution, and committed two basic procedural errors in the most recent proceedings. The error of reducing Gupta's sentence for acceptance of responsibility was obvious and gratuitous, and we had warned the district court

about failing to make a calculation of actual or intended loss. We stated in *Gupta II* that "the district court's finding of no loss is not a reasonable estimate. The district court did not apply relevant calculation as to the greater of intended or actual loss. The court's belief that no crime was committed does not nullify its duty to calculate the Guidelines loss amount." 463 F.3d at 1200. Despite that mandate, the district court failed to make any calculations at all on remand. Although the district court acknowledged its obligation to follow our mandate, the district court failed to fulfill that obligation. We see no basis for a belief that the district court will employ a different approach if given another chance.

Reassignment will not produce excessive duplication. Although the district court has considered the parties' expert reports about loss, the district court has not made any findings about key issues in those reports. A new judge would need to become familiar with the history of this appeal, but our published opinions in *Gupta I* and *Gupta II* provide much of the essential information.

We are especially persuaded that reassignment is necessary because of the protracted history of this action. The situation is qualitatively different now than it was in *Gupta I* or *Gupta II*. The refusal of the district court to set aside its feelings is more pronounced after a third appeal and a second request for reassignment, and we see no basis for a belief that the district court will adjust its view if given another chance. The district court has suggested that "[its]

eyes are going blind trying to understand all of this" and that it is not capable of addressing the issues about loss that remain disputed.

Reassignment is necessary to preserve the appearance of justice. "We do not question the district judge's actual ability, integrity, and impartiality. Rather, we respond to the appearance of a lack of neutrality and act to preserve in the public mind the image of absolute impartiality and fairness of the judiciary. We do not order this case reassigned lightly." *Torkington*, 874 F.2d at 1447.

V. CONCLUSION

We **VACATE** the order of the district court and **REMAND** for resentencing. We remand with the instruction to the Chief Judge of the Southern District of Florida that the case be **REASSIGNED** to a different district judge.

BARKETT, Circuit Judge, concurring in part and dissenting in part,

I agree that we must remand for a determination of actual loss and to consider the issue of restitution which is dependent on the actual loss that occurred. However, I would not order the reassignment of this case to another judge. Having clearly explicated our reasoning in this complicated case, I believe the district judge can fairly make the determinations deemed necessary by this opinion. If it is going to be

reassigned, it should be at the request of the judge presently presiding over this case.

United States District Court
Southern District of Florida
WEST PALM BEACH DIVISION

UNITED STATES OF AMERICA	**SECOND AMENDED JUDGMENT IN A CRIMINAL CASE**
v.	
MAHENDRA GUPTA	**Case Number: 98-6118 CR RYSKAMP**
	USM Number: 05737-046
	Counsel For Defendant: Neal Sonnett, Esq.
	Counsel For The United States: Leif Johnson, AUSA
	Court Reporter: Mary Desiderio – Official Reporting Service

The defendant pleaded guilty Count(s) 1-3 of the Indictment.

The defendant is adjudicated guilty of the following offense(s):

TITLE/SECTION NUMBER	NATURE OF OFFENSE	OFFENSE ENDED	COUNT
18 U.S.C. § 286	Conspiracy to Submit false claims	July 20, 1998	1
18 U.S.C. § 1341	Mail Fraud	July 20, 1998	2 and 3

The defendant is sentenced as provided in the following pages of this judgment. The sentence is

imposed pursuant to the Sentencing Reform Act of 1984.

It is ordered that the defendant must notify the United States attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant must notify the court and United States attorney of any material changes in economic circumstances.

Date of Imposition of Sentence:
3/28/2008

/s/ Kenneth L. Ryskamp
KENNETH L. RYSKAMP
United States District Judge

April 9, 2008

PROBATION

The defendant is hereby sentenced to probation for a term of 3 years.

The defendant shall not commit another federal, state or local crime.

The defendant shall not unlawfully possess a controlled substance. The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug trust within 15 days of release form imprisonment and at least two periodic drug tests thereafter, as determined by the court.

The defendant shall not possess a firearm, destructive device, or any other dangerous weapon.

If this judgment imposes a fine or a restitution obligation, it is a condition of supervised release that the defendant pay in accordance with the Schedule of Payments sheet of this judgment.

The defendant must comply with the standard conditions that have been adopted by this court as well as any additional conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

1. The defendant shall not leave the judicial district without the permission of the court or probation officer;
2. The defendant shall report to the probation officer as directed by the court or probation officer and shall submit a truthful and complete written report within the first five days of each month;
3. The defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;
4. The defendant shall support his or her dependents and meet other family responsibilities;
5. The defendant shall work regularly at a lawful occupation, unless excused by the probation officer for schooling, training, or other acceptable reasons;

6. The defendant shall notify the probation officer at least ten (10) days prior to any change in residence or employment;

7. The defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance or any paraphernalia related to any controlled substances, except as prescribed by a physician;

8. The defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

9. The defendant shall not associate with any persons engaged in criminal activity and shall not associate with any person convicted of a felony, unless granted permission to do so by the probation officer;

10. The defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer;

11. The defendant shall notify the probation officer within seventy-two (72) hours of being arrested or questioned by a law enforcement officer;

12. The defendant shall not enter into any agreement as an informer or a special agent of a law enforcement agency without the permission of the court; and

13. As directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal

record or personal history or characteristics and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

SPECIAL CONDITIONS OF SUPERVISION

The defendant shall also comply with the following additional condition(s) of probation:

Home Detention with Electronic Monitoring: The defendant shall participate in the Home Detention Electronic Monitoring Program for a period of twelve months. During this time the defendant shall remain at his place of residence except for employment and other activities approved in advance, and provide the U.S. Probation Officer with requested documentation. The defendant shall maintain a telephone at his place of residence without 'call forwarding', 'call waiting', a modem, 'caller ID', or 'call back/call block' services for the above period. The defendant shall wear an electronic monitoring device and follow the electronic monitoring procedures as instructed by the U.S. Probation Officer. The defendant shall pay for the electronic monitoring equipment at the prevailing rate or in accordance with ability to pay.

The defendant shall provide complete access to financial information, including disclosure of all business and personal finances, to the U.S. Probation Officer.

DEFENDANT: MAHENDRA GUPTA
CASE NUMBER: 98-6118 CR RYSKAMP

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the Schedule of Payments.

Total Assessment	Total Fine	Total Restitution
$200.00	$25,000.00	$

*Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18, United States Code, for offenses committed on or after September 13, 1994, but before April 23, 1996.

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties are due as follows:

A. Lump sum payment of **$200.00** due immediately.

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

The assessment/fine/restitution is payable to the CLERK, UNITED STATES COURTS and is to be addressed to:

U.S. CLERK'S OFFICE
ATTN: FINANCIAL SECTION
301 N. MIAMI AVENUE, ROOM 150
MIAMI, FLORIDA 33128

The assessment/fine/restitution is payable immediately. The U.S. Bureau of Prisons, U.S. Probation Office and the U.S. Attorney's Office are responsible for the enforcement of this order.

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) community restitution, (6) fine interest, (7) penalties, and (8) costs, including cost of prosecution and court costs.

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 08-12248

UNITED STATES OF AMERICA,

Plaintiff-Appellant,

versus

MAHENDRA PRATAP GUPTA,
CARDINAL CARE, INC.,
MARSHAL MEDICAL SERVICES, INC.,

Defendants-Appellees.

On Appeal from the United States District Court
for the Southern District of Florida

ON PETITION(S) FOR REHEARING AND
PETITIONS FOR REHEARING EN BANC

(Filed Aug. 31, 2009)

Before: BARKETT and PRYOR, Circuit Judges, and EDENFIELD,* District Judge.

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* Honorable B. Avant Edenfield, United States District Judge for the Southern District of Georgia, sitting by designation.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/s/ Judge William H. Pryor, Jr.
UNITED STATES CIRCUIT JUDGE

ORD-42
(2/05)

The Statutes Involved In The Case Include The Following:

18 U.S.C. § 3663, Order of restitution, states, in pertinent part:

(a)

(1)

(A) The court, when sentencing a defendant convicted of an offense under this title, section 401, 408(a), 409, 416, 420, or 422(a) of the Controlled Substances Act (21 U.S.C. 841, 848(a), 849, 856, 861, 863) (but in no case shall a participant in an offense under such sections be considered a victim of such offense under this section), or section 5124, 46312, 46502, or 46504 of title 49, other than an offense described in section 3663A(c), may order, in addition to or, in the case of a misdemeanor, in lieu of any other penalty authorized by law, that the defendant make restitution to any victim of such offense, or if the victim is deceased, to the victim's estate. The court may also order, if agreed to by the parties in a plea agreement, restitution to persons other than the victim of the offense.

(B)

(i) The court, in determining whether to order restitution under this section, shall consider –

(I) the amount of the loss sustained by each victim as a result of the offense; and

(II) the financial resources of the defendant, the financial needs and earning ability of the defendant and the defendant's dependents, and such other factors as the court deems appropriate.

(ii) To the extent that the court determines that the complication and prolongation of the sentencing process resulting from the fashioning of an order of restitution under this section outweighs the need to provide restitution to any victims, the court may decline to make such an order.

(2) For the purposes of this section, the term "victim" means a person directly and proximately harmed as a result of the commission of an offense for which restitution may be ordered including, in the case of an offense that involves as an element a scheme, conspiracy, or pattern of criminal activity, any person directly harmed by the defendant's criminal conduct in the course of the scheme, conspiracy, or pattern. In the case of a victim who is under 18 years of age, incompetent, incapacitated, or deceased, the legal guardian of the victim or representative of the victim's estate, another family member, or any other person appointed as suitable by the court, may assume the victim's rights under this

section, but in no event shall the defendant be named as such representative or guardian.

* * *

(7)

(A) The United States Sentencing Commission shall promulgate guidelines to assist courts in determining the amount of restitution that may be ordered under this subsection.

(B) No restitution shall be ordered under this subsection until such time as the Sentencing Commission promulgates guidelines pursuant to this paragraph.

(d) An order of restitution made pursuant to this section shall be issued and enforced in accordance with section 3664.

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18 U.S.C. § 3663A, "Mandatory restitution to victims of certain crimes," states, in pertinent part:

(a)

(1) Notwithstanding any other provision of law, when sentencing a defendant convicted of an offense described in subsection (c), the court shall order, in addition to, or in the case of a misdemeanor, in addition to or in lieu of, any other penalty authorized by law, that the defendant make restitution to the victim of the offense or, if the victim is deceased, to the victim's estate.

(2) For the purposes of this section, the term "victim" means a person directly and proximately harmed as a result of the commission of an offense for which restitution may be ordered including, in the case of an offense that involves as an element a scheme, conspiracy, or pattern of criminal activity, any person directly harmed by the defendant's criminal conduct in the course of the scheme, conspiracy, or pattern. In the case of a victim who is under 18 years of age, incompetent, incapacitated, or deceased, the legal guardian of the victim or representative of the victim's estate, another family member, or any other person appointed as suitable by the court, may assume the victim's rights under this section, but in no event shall the defendant be named as such representative or guardian.

* * *

(c)

(1) This section shall apply in all sentencing proceedings for convictions of, or plea agreements relating to charges for, any offense –

* * *

(B) in which an identifiable victim or victims has suffered a physical injury or pecuniary loss.

* * *

(3) This section shall not apply in the case of an offense described in paragraph (1)(A)(ii) if the court finds, from facts on the record, that –

(A) the number of identifiable victims is so large as to make restitution impracticable; or

(B) determining complex issues of fact related to the cause or amount of the victim's losses would complicate or prolong the sentencing process to a degree that the need to provide restitution to any victim is outweighed by the burden on the sentencing process.

(d) An order of restitution under this section shall be issued and enforced in accordance with section 3664.

UNITED STATES SENTENCING COMMISSION

PUBLIC HEARING

* * *

WEDNESDAY, SEPTEMBER 9, 2009
AND
THURSDAY, SEPTEMBER 10, 2009

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The public hearing convened in the Hon. James Benton Parsons Ceremonial Courtroom in the Everett McKinley Dirksen United States Courthouse, 219 South Dearborn Street, Chicago, Illinois, at 8:45 a.m. Wednesday, September 9, 2009, and 9:05 a.m. Thursday, September 10, 2009, the Hon. Ricardo H. Hinojosa, Acting Chair, presiding.

COMMISSIONERS PRESENT:

RICARDO H. HINOJOSA, Acting Chair
WILLIAM B. CARR, JR., Vice Chair
RUBEN CASTILLO, Vice Chair
WILLIAM K. SESSIONS, III, Vice Chair
DABNEY L. FRIEDRICH, Commissioner
BERYL A. HOWELL, Commissioner
JONATHAN J. WROBLEWSKI,
Ex-Officio Commissioner

STAFF PRESENT:

JUDITH W. SHEON, Staff Director
BRENT NEWTON, Deputy Staff Director

Court Reporter:

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PANELISTS PRESENT:

HON. JAMES F. HOLDERMAN, JR., Chief District Judge, Northern District of Illinois

HON. JAMES G. CARR, Chief District Judge, Northern District of Ohio

HON. GERALD E. ROSEN, Chief District Judge, Eastern District of Michigan

HON. JON P. McCALLA, Chief District Judge, Western District of Tennessee

HON. KAREN K. CALDWELL, District Judge, Eastern District of Kentucky

HON. PHILIP PETER SIMON, District Judge, Northern District of Indiana

PHILIP MILLER, Chief Probation Officer, Eastern District of Michigan

RICHARD TRACY, Chief Probation Officer, Northern District of Illinois

HON. J. MICHAEL BROWN, Secretary of Justice and Public Safety, Commonwealth of Kentucky, Frankfort, Kentucky

DAVID M. KENNEDY, Director, Center for Crime Prevention and Control, John Jay College of Criminal Justice, New York, New York

HON. DANNY J. BOGGS, Circuit Judge, Sixth Circuit Court of Appeals

HON. FRANK H. EASTERBROOK, Chief Circuit Judge, Seventh Circuit Court of Appeals

HON. JEFFREY S. SUTTON, Circuit Judge, Sixth Circuit Court of Appeals

HON. PATRICK J. FITZGERALD, United States Attorney, Northern District of Illinois

HON. EDWARD M. YARBROUGH, United States Attorney, Middle District of Tennessee

CAROL BROOK, Federal Public Defender, Northern District of Illinois

JAQUELINE JOHNSON, First Assistant Federal Public Defender, Northern District of Ohio

THOMAS W. CRANMER, Principal, Miller, Canfield, Paddock and Stone, Troy, Michigan

JAMES VAN DYKE, Executive Director, Salvation Army Correctional Services Program, Chicago, Illinois

CARL WICKLUND, Executive Director, American Probation and Parole Association, Lexington, Kentucky

HON. ROGER K. WARREN, President Emeritus, National Center for State Courts, Williamsburg, Virginia

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Adjourn

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[192] host here.

ACTING CHAIR HINOJOSA: You all are the only panel that can tell us what to do –

(Laughter.)

ACTING CHAIR HINOJOSA: – but you are the appellate judges, and we will proceed in that fashion.

CHIEF JUDGE EASTERBROOK: Thank you, Judge Hinojosa.

The sentencing guidelines were designed a generation ago to carry out a legislative policy of determinant sentences with a minimum of judicial discretion. The Supreme Court's decisions in *Booker*, *Kimbrough* and *Spears*, which make the guidelines advisory, call for a change in their structure. Every system of regulations ought to be matched to its purpose, yet the Commission hasn't revised the general structure of the guidelines since *Booker*, and it seems to me that doing this is the most important current task.

If the Supreme Court had just eliminated the guidelines from the list of things the district judges are obliged to do at sentencing, as some justices contended that should happen, then a structural revision wouldn't be important. The Commission could maintain the guidelines in any form they wanted as

recommendations to the district judges. But what the court has held is that district judges must calculate the guideline range correctly, after which they can impose any reasonable sentence. And the court of appeals [193] then must review the district judges' guideline calculations, as well as the reasonableness of the sentence, and many a case these days is being reversed with the observation that the district court didn't calculate the guidelines correctly. The sentence may well be perfectly fine, but go try again.

This means that both the district courts and the court of appeals may be required to carry out an exercise that has a limited, if any, effect on the sentence. It's a make-work prescription; but if work is to be made, there should be less rather than more, and that will conserve judicial time for more pressing tasks and the other litigants in a very long queue.

The guidelines ought to be designed so that they provide information to district Judges about how comparable cases are handled across the nation. That fulfills their principal function of curtailing unwarranted disparities without engaging in a needless level of detail.

When the guidelines were mandatory, detail was vital, and the statute called for ranges to be no more than 25 percent, from top to bottom. Now that the guidelines are advisory, two principal changes can and should be made:

One, the ranges should exceed 25 percent.

Second, the overlap in the ranges should be increased.

Those two changes together will reduce the need to [194] make precise findings that don't affect the outcome and, thus, save time for both district and appellate judges without sacrificing any of the statutory goals.

Current doctrine – this, by the way, was something that Judge Breyer said in defense of the guidelines right at the outset, that we were going to design things with overlaps and avoid these problems – but current doctrine has it that unless the district judge formally says on the record something like my sentence is unaffected by how I resolve X, and the sentence is within a range that is generated no matter how X was resolved, unless both of those things are true, then the court of appeals has to determine whether X got resolved correctly.

After *Booker*, there's little point to that fastidiousness, and the Commission can end it at a stroke by adopting a presumption that the resolution of any issue is irrelevant when the sentence is within an area where the ranges overlap no matter how that issue is resolved. That, plus somewhat wider ranges, would do a great deal to avoid wastes of lawyers' and judges' time.

My court has recommended that judges practice self-help in the interim. We've urged them to say that resolving one or another disputed point just doesn't matter to the final sentence, not only when the

ranges overlap, but also when they don't and they've decided to use their discretion [195] under *Booker* and its successors to give a particular sentence. That advice was directed to district judges, but its spirit is equally applicable to guideline design.

Let me give you an example. It's prompted by a case now under advisement in my court. I won't mention the name of the case or the precise details, since the opinion hasn't been released, but it illustrates a kind of problem that's common, yet avoidable.

Smith, I'll call him, is charged with distributing drugs, and his principal customer is Jones. The evidence at trial shows that Smith has been a commercial distributor for at least a year and has many customers in addition to Jones. The district court needs to determine Smith's relevant conduct in order to decide how many offense levels to add under the drug quantity table in Section 2D1.1.

The judge takes testimony from Jones and two other customers, all cooperating as part of plea bargains. The judge has to decide whether they're to be believed and, if they're telling the truth, whether their memories are accurate.

Let's suppose that the three customers together narrate sales that come to 1.95 kilograms of cocaine. The drug quantity table distinguishes between 2 kilograms or more – that's level 26 – and 500 to 1,999 grams. That's level 24. That's not a statutory breakpoint. The statutory [196] breakpoint is at 5

kilograms, but the prosecutor wants the higher offense level, so he introduces evidence that when Smith was arrested, he was carrying $3,000. The prosecutor argues that the money must have come from drugs, which should be converted to a cocaine equivalent, which will push Smith over the two-kilo threshold.

The need to resolve this argument about the source of funds requires a two-day hearing in the district court, and it's the subject of an appeal and potentially a remand to do it over.

The question I have is why should we have a set of guidelines under which this thing can be at issue in the first place? The reason why that hearing was held is because two levels, two offense levels, can mean several extra years in prison. But why draw the distinction? A dealer whose business entails 2,000 grams is no different in social dangerousness from one whose business entailed 1,999 grams. Indeed, as a practical matter, there's little reason to distinguish 2,500 grams from 1,500 grams. Not only is the dangerousness about the same, but the measurement error in these cases is so great that the court's effort to separate them is not reliable.

It's not simply are the witnesses honest. It's did they remember accurately? People don't document their illegal transactions with the detail that Merck keeps records of its [197] pharmaceuticals. The guidelines need to recognize that approximations are

inevitable. I think a court is lucky if it gets quantity correct within a factor of five.

And if approximations are inevitable, lines like the one I'm just describing need to be blurred. That implies overlapping the quantity tables, overlapping the sentencing ranges derived from those tables, or both. The goal should be a reasonable approximation, rather than an illusory exactitude.

The example I've given also illustrates another problem, a quest to measure with precision what appears to be measurable at the expense of a larger picture. If we want to know how bad an offender Smith is, we need to know what he sold to all of his customers over the course of his business, not what he sold to the three customers who can be persuaded to testify. Trying to make precise decisions about a subset of the defendant's business means devoting days of judicial time to the wrong question.

Guidelines should urge district judges to stop pretending that the social concern with crime stops with the person on the witness stand and to start making estimates of the defendant's whole business. Those estimates will, of course, be imprecise, maybe even worse than a factor of five; but imprecision is less important the wider the ranges are and the more they overlap.

[198] My point is, to be short, that the guidelines should urge district judges, to stop urging district judges to measure what they think they can measure with live witnesses and to make approximations of

what really matters to the dangerousness of the offense behavior.

Now, let me move from drugs and other crimes that come within the relevant conduct rules to recidivist sentencing. Congress required the Commission to provide that repeat offenders who have three convictions for violent crimes or serious drug offenses must be sentenced at or near the statutory maximum. That's 28 U.S.C. 994(h). The Commission's career offender guideline, 4B1.1, which was devised to fulfill that mandate, goes beyond the statutory list. That has certain consequences that my court's at *Knox* opinion discusses. I, for one, am not troubled by the Commission's decision to establish its own list of prior offenses that justify recidivist treatment. My concern, rather, is that the Commission didn't do enough to establish its own list.

Instead of producing its own definition of violent felony or serious drug offense, the Commission copied language from the Armed Career Criminal Act, 18 U.S.C. 924(e). That act of copying has led my circuit and most others to hold that the guidelines must be understood in the same way as the Supreme Court has understood 924(e) and a similar definition in 18 U.S.C. § 16, and that definition has needlessly [199] complicated sentencing.

But there are two sources of complication. First, the Supreme Court has adopted what it calls a modified categorical approach under which a court looks at the statutory definition of a prior conviction in order

to classify it as violent or a serious drug offense. When one state statute covers multiple offenses, which is fairly common, the court may examine the charging papers and plea colloquy but nothing else. Police reports are out.

Second, the guideline, like the statutes, has a residual category under which certain crimes that are dangerous in fact count as violent felonies even if the elements of that offense don't include an aggressive act. The Supreme Court's decision last year in *Begay* has made application of that residual category substantially more difficult. I won't get into the tedious details, though my circuit's opinion in the last couple of months in *Woods* and *Evans* explore them at great length.

But I can't think of any reason why all the complexities of the statutes, which set mandatory minimum sentences and dramatically raise maximum sentences, should apply to calculations under the guidelines which affect neither minimum nor maximum sentences.

My circuit said in *Woods* that a district judge, after applying 4B1.1, is free to use the discretion he enjoys under [200] *Booker* and its successors to raise the sentence to reflect the defendant's real conduct, even if it turns out that one of the prior offenses was not technically classified as a violent felony.

This means that the judge must first ignore the actual conduct underlying the prior convictions, classify the offense under an absolutely rococo

system, and then come back, look at what's actually going on, and then make his real decision. It's a layer cake of decisions.

I say take Ockham's razor and slice off the complexity. If the judge is eventually at the discretionary stage authorized to look at the actual facts of the prior offense behavior, then the guidelines should allow that at the outset, rather than requiring this cascade of decisions. In other words, the guidelines should say that the modified categorical approach just doesn't apply to 4B1.1.

Second, the guidelines should get rid of the residual category of violent or dangerous offenses with all the difficulties that *Begay* has introduced. It can easily be replaced with a list of crimes that the Commission thinks as so dangerous that they justify a special recidivist enhancement, or it can be replaced with discretion, permitting the district judge to use the pre-*Begay* approach to determining a prior crime's dangerousness.

Now, I happen to prefer the list. A list is always [201] simpler, and it curtails dispute. And, of course, lists have loopholes and oversights, but so be it. After *Booker*, the judge remains free to impose a reasonable sentence even if the guidelines have lacunae.

Instead of trying to perfect – this is my basic message: Instead of trying to perfect the guidelines to cover every contingency, the Commission should simplify the guidelines to get the main themes right and rely on sound discretion in the district courts to

address unusual details. I could go on, but I think I've given enough illustrations to make my point.

After *Booker*, simplification is much to be desired. It yields gains for litigants, for judges, and for society at large.

Thank you.

ACTING CHAIR HINOJOSA: Thank you, Judge Easterbrook. What's the next?

Judge Sutton.

JUDGE SUTTON: Thank you, Judge Hinojosa, and thank you for hearing from the perspective of a non-chief judge. I appreciate that. Let me make two comments about Chief Judge Easterbrook's remarks and then make a remark of my own.

I'd like to echo the point about crimes of violence. This is a disaster. It's not your problem, at least – well, there may be a solution, and I'm not sure I can blame the

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